(1) (5)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

CRIMINAL APPEAL NO. 480/2006.

APPELLANTS
(IN JAIL)

1. Ramji Jha son of Bindeshwari Jha aged 52 years R/o Pachkhuti P.S.Khagdiya (Bihar).
2. Jeeturam s/o Gochiya Sonwani aged 35 years R/o Tedapadi P.S.Khoksara Distt.Kalahandi
3. Shiv son of Anandram Thethwar aged 30 years R/o Bitkuli District Durg (C.G.).

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VERSUS

RESPONDENT
PROSECUTION

State of Chhattisgarh
Through : P.S. Deobhog
Distt. Raipur (C.G.(

2488/06

Filed on 13/6/06
by Shri S. Lal & Maisaria Advocate
13/6/06
D.R.(J)

APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973.

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 480/2006

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

RAMJI & TWO OTHERS

Vs.

STATE OF CHHATTISGARH

Post for Orders:

Sd/-
Dilip Raosaheb Deshmukh
Judge
28-07-2006

A.F.R.

(A2)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 480/2006

RAMJI & TWO OTHERS

Vs.

STATE OF CHHATTISGARH

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Present: -
Shri Yogeshwar Sharma, learned counsel for the appellants.
Shri Ravindra Agrawal, Panel Lawyer for the State.

JUDGMENT
(Delivered on 28-07-2006)

This appeal is directed against the judgment dated 27-04-2006 passed by Special Judge, (N.D.P.S. Act.), Raipur in Special Criminal Case No.52/2004 whereby the appellants were convicted under Section-20(b) (ii)(C) of the Narcotics Drugs & Psychotropic Substances Act. 1985 (hereinafter referred to as "Act") and were sentenced to undergo rigorous imprisonment for 10 years and fine of Rs. 1 Lakh and in default of payment of fine to undergo additional rigorous imprisonment for 2 years.

2. Briefly stated the prosecution story is that on 20-11-2004 Station House Officer, Police Station-Devbhog, Shri Ashish Shukla received secret information that the appellants were in possession of illicit ganja at Bus Stand, Devbhog. After recording the said information, he proceeded to the spot along with independent witnesses

Prem lal PW-1 & Khagesh PW-2 and Head Constable P.L.Jagdalla PW-7 and saw the appellants standing at the Bus Stand, Devbhog with a box made of a tin, 2 bags and one plastic bag lying near them. After completing necessary legal formalities relating to search and seizure, the aforesaid containers were searched and were found to contain illicit ganja. Weighment was got done by Station House Officer Shri Ashish Shukla PW-5 and it was found that tin box contained 13.600 K.G. of ganja, 2 bags contained 12.500 K.G. & 8.500 K.G. of ganja respectively and the plastic bag contained 2.400 K.G. of ganja. Thus in all, 37 K.G. of ganja was seized from the appellants. From each container, two samples of 50 Grams each were taken and marked as A-1 & A-2, B-1 & B-2, C-1 & C-2, D-1 & D-2 and sealed. The illicit ganja so recovered from the conscious possession of the appellants, was handed over to Head Constable Rajiv Lochan Singh PW-3 on 20-11-2004 for being kept in the Malkhana at Police Station-Devbhog and entry was made in the Malkhana Register Ex.P-12'C'. On 21-11-2004 vide memo of Superintendent of Police Ex.P-16, 8 sample packets of 50 grams each were sent for chemical analysis to Forensic Science Laboratory through Constable Dharmendra Kumar Verma, No.808 of Police Station-Devbhog, PW-6, who delivered the samples packets at the Forensic Science Laboratory on 23-11-2004. Vide report Ex.C-1 dated 24-05-2005, it was opined that all the packets contained ganja. After completing investigation, the appellants were prosecuted under Section-20(b)(ii) (C) of the Act.

3. The appellants abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined 7 witnesses. Relying

upon the evidence led by the prosecution, learned trial Judge convicted and sentenced the appellants as aforesaid in para-1. (Supra)

4. Shri Yogeshwar Sharma, learned counsel for the appellants has contended that the evidence led by the prosecution falls short of the requisite proof required to convict the appellants under Section-20(b)(ii)(C) of the Act. Independent witness Premlal PW-1 & Khagesh PW-2 did not support the prosecution story. There was nothing in the testimony of Station House Officer Shri Ashish Shukla, PW-5 to show that ganja was found in the conscious possession of any of the appellants. Malkhana Register Ex.P-12 did not show that the sample packets were entrusted in a sealed condition. Specimen impression of the seal used to seal the sample packets as also the remaining ganja was not prepared. Specimen impression of the seal affixed on the seizure memo Ex.P-1 was illegible. Constable Dharmendra Kumar Verma PW-6 who had taken the sample packets of ganja for chemical analysis to Forensic Science Laboratory, stated that he had taken the sample packets on 21-11-2004 and delivered it to Forensic Science Laboratory on 23-11-2004. He did not give any explanation regarding possession of sample packets from 21-11-2004 to 23-11-2004. Lastly, it was urged that there was total non-compliance of Section-55 of the Act since the evidence led by the prosecution did not show that before entrusting the ganja and also the 8 sample packets at the Malkhana, the Station House Officer Shri Ashish Shukla PW-5 had affixed his seal to the aforesaid articles. The seal affixed on seizure memo Ex.P-1 also did not show that it was a seal of the Station House Officer. On these premises, it was urged that conviction of the appellants under Section-20(b)(ii)(C) of the Act and the sentence awarded thereunder by the

learned trial Judge is liable to be set aside. On the other hand, Shri Ravindra Agrawal, Panel Lawyer argued in support of the impugned judgment.

5. Having considered the rival submission, I have perused the record of Special Criminal Case No.52/2004. The testimony of Station House Officer Shri Ashish Shukla, PW-5 reveals that he had received secret information that accused Ramji was standing at Bus Stand-Devbhog with his two companions and was in possession of illicit ganja. However, he did not state in his testimony that after reaching the Bus Stand, he found the appellants in conscious possession of ganja. His testimony is silent as to where the containers of ganja were kept at the bus stand, in what manner was it in the possession of the appellants or any one of them and how. In cross examination para-3, he admitted that he also did not mention the aforesaid facts in seizure memo Ex.P-1. It is not the case of the prosecution that the appellants were carrying the containers in hand or on their person.

6. Independent witnesses Premlal PW-1 & Khagesh PW-2 did not support the prosecution story and were declared hostile. The testimony of Head Constable P.L.Jagdalla PW-7 also does not show as to where the ganja was kept and in whose possession. Thus, there is not even an iota of evidence to show that the ganja mentioned in seizure memo Ex.P-1 was found in the conscious possession of any of the appellants. P.L.Jagdalla PW-7 stated that the appellants were apprehended at the bus stand at 6.30 A.M. whereas the secret information Panchnama Ex.P-2 itself was prepared at 6.45 P.M. and the appellants were

searched at 8.40 A.M. Similarly, Head Constable Rajiv Lochan Singh PW-3 stated as per Ex.P-12-C that the seized contraband and the sample packets were received at the Malkhana of Police Station-Devbhog at 8.40 A.M. on 20-11-2004 whereas the appellants were arrested at 8.55 A.M. on 20-11-2004.and the F.I.R. Ex.P-15 was given at Police Station-Devbhog at 09.10 A.M. This renders the prosecution story and the testimony of Ashish Shukla PW-5 doubtful.

7. Section-55 of the Act envisages that before entrusting the contraband ganja and the sample packets in the Malkhana, the Station House Officer shall affix his seal on such articles. The testimony of Shri Ashish Shukla, Station House Officer, PW-5 does not show that before entrustment of contraband ganja and the 8 sample packets, he had affixed his seal on these packets. Malkhana Register Ex.P-12-C also does not show that contraband ganja contained in one tin bag, two bags and one plastic bag as also the 8 sample packets were entrusted for safe custody in a sealed condition. There is absolutely no mention in Malkhana Register Ex.P-12-C that any seal was found either on the abovementioned containers or on the sample packets and no evidence on record to show that after affecting the seizure, Shri Ashish Shukla, PW-5 had prepared a specimen impression of the seal for being sent along with the sample packets to the Forensic Science Laboratory. The seal affixed on seizure memo Ex.P-1 appears to be a general seal of Police Station-Devbhog and not the seal of Station House Officer. In this manner, the prosecution has also failed to establish compliance of Section-55 of the Act.

8. An Entry dated 21-11-2004 in the copy of the Malkhana Register Ex.P-12-C shows that on 21-11-2004 8 sealed sample packets were handed over to Constable Dharmendra Kumar Verma PW-6. It is not clear whether the sample packets were sealed at the Police Station before entrustment to Constable Dharmendra Kumar Verma PW-6. This witness has stated in cross examination that he went on 23-11-2004 to deliver the sample packets at the Forensic Science Laboratory. Thus, no explanation is forthcoming regarding the possession of sample packets from 21-11-2004 till 23-11-2004. Since, the seal affixed on the sample packets was not the seal of the Station House Officer of Police Station-Devbhog, the possibility that during this period the sample packets could have been tampered with cannot be ruled out.

9. Thus from the above discussion, the following points emerge:-

(A) There is no evidence to show that the 4 containers from which total 37 K.G. the contraband ganja was seized, were in conscious possession of the appellants.

(B) There is total non-compliance of Section-55 of the Act.

(C) Independent witnesses Premlal PW-1 & Khagesh PW-2 did not support the prosecution story.

(D) The possibility that the sample packets could have been tampered with before being entrusted to the Forensic Science Laboratory could not be ruled out.

(E) Testimony of Ashish Shukla PW-5, Station House Officer, Devbhog relating to time of search and seizure is rendered doubtful.

10. Having thus considered the evidence led by the prosecution in its entirety and the above facts emerging therefrom, I am of the considered opinion that conviction of the appellants under Section-20(b)(ii)(C) of the Act and the sentence awarded thereunder are liable to be set aside.

11. Regrettably, it is noticed that the two successive learned trial Judges acted mechanically while recording evidence and the conviction of the appellants under Section-20(b)(ii)(C) of the Act without there being any legal evidence. Time and again it has been reiterated that an offence under the Act entails severe penalty of minimum sentence of imprisonment for 10 years and a minimum fine of Rs.1 lakh. It was, therefore the obligation, nay, the pious duty of the trial Judge not to have acted mechanically while convicting the accused without legal evidence. The manner in which the evidence was recorded and trial was conducted shows a serious lapse on the part of the two learned trial Judges. Answers given by the appellant Shiv were not recorded in his examination under Section-313 of Cr.P.C. on questions S.No.30 to 36. Although, the columns for answer were left blank yet the learned trial Judge signed it without even looking at it. The necessary certificate to be recorded after examining the accused under Section-313 of Cr.P.C. was also not signed by the learned trial Judge. Another trial Judge who earlier recorded evidence did not ask relevant questions to the Station House Officer Ashish Shukla PW-5 regarding conscious possession of the appellants over the contraband ganja or about the compliance of Section-55 of the Act. He also did not ask any question to Head Constable Rajiv Lochan Singh PW-3 while exhibiting the Malkhana Register, as to why the copy of the register did not mention that the

sample packets were sealed. He acted like a mute spectator and recorded evidence mechanically. It could be that the copy prepared of Ex.P-12-C was an incomplete copy. Examination of accused was also not prepared in conformity with the evidence. Question No.11 & 12 mentioned that 3 boxes, 2 bags and one plastic bag were seized and searched whereas the evidence showed that only one tin box, 2 bags and one plastic bag were seized and searched by Shri Ashish Shukla, PW-5. If trial is conducted in the manner in which it was done in the present case and without therebeing any legal evidence conviction is recorded and a very severe though minimum sentence awarded mechanically, it erodes the confidence of people in the judicial system.

12. In the result, this appeal is allowed. Conviction of the appellants under Section-20(b)(ii)(C) of the Act and sentences awarded thereunder are set aside. The appellants are acquitted and shall be set at liberty forthwith, if not required in any other case.

Sd/-
Dilip Raosaheb Deshmukh
Judge

28 -07-2006